Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ANITA LOCKWOOD, Secretary of Department of Energy, Minerals and Natural Resources; and WALTER SMITH, former Director of the Energy Conservation and Management Division of the Department of Energy, Minerals and Natural Resources; in their individual capacities,

Petitioners,

vs.

JAMES KOZAK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent states the first question as follows:

I. Whether, in an action brought in state court pursuant to 42 U.S.C. § 1983, a state appellate court is compelled as a matter of federal law to hear defendants' appeal from an interlocutory order denying their claim to qualified immunity?

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OTHER AUTHORITIES:

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JURISDICTION

Petitioners have invoked 28 U.S.C. § 1257(3) to support their claim to this Court's jurisdiction. The recodification of that statute in 1988 eliminated § 1257(3); presumably Petitioners should have cited to 28 U.S.C. § 1257(a).

It is more important to clarify that while Petitioners have discussed two rulings of the New Mexico Supreme Court, e.g., Petition at 1, 5-6, 22 and Appendices A and C, the Petition is timely only as to the ruling set forth in Appendix A, Supreme Court Rule 13. The order set forth in Appendix C was issued November 28, 1990 and no timely Petition for Writ of Certiorari was filed therefrom.

STATUTES INVOLVED

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1441. Actions removable generally

* * *

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * *

NMSA 1978, § 39-3-2. Civil appeals from district court.

Within thirty days from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights, in any civil action in the district court, any party aggrieved may appeal therefrom to the supreme court or to the court of appeals, as appellate jurisdiction may be vested by law in these courts.

NMSA 1978, § 39-3-4. Interlocutory order appeals from district court.

A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.

B. The supreme court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in these courts. Within ten days after entry of the order or decision, any party aggrieved may file with the clerk of the supreme court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the interlocutory order or decision. If an application has not been acted upon within twenty days, it shall be deemed denied.

C. Application under this section for an order allowing appeal does not stay proceedings in the district court unless so ordered by the district judge or a judge or justice of the court to which application is made.

NMSA 1978, § 41-4-4. Granting immunity from tort liability; authorizing exceptions.

* * *

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including

costs and attorneys' fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

* * *

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort which was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico which occurred while the public employee was acting within the scope of his duty.

* * *

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty

while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated, if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

STATEMENT OF THE CASE

Respondent disagrees in several respects with the Statement of the Case presented by Petitioners. Most importantly, at Page 4, Petitioners have stated that after the hearing held by the Deputy Secretary and Department Attorney and a brief discussion with Petitioner Lockwood, "Petitioner Anita Lockwood . . . saw no reason to change the initial decision to terminate Plaintiff," Petitioner at 4. Petitioners have failed to point out that Petitioner Lockwood has testified in deposition that the sole aspect of the "hearing" she discussed with the two department officials was the fact that U.S. Department of Energy consultant Tom Stroud had testified at Plaintiff's request, and the only action taken by Petitioner Lockwood as a consequence of the hearing was to ask that Department not to have Mr. Stroud participate in the next review of the New Mexico department's program because of his participation in the hearing.

Petitioners' summary also omits to mention that neither the Department Deputy nor the attorney had any

authority on his own to reconsider the dismissal of Plaintiff.

Respondent also points out that the reason given in the notice of termination to Plaintiff was totally devoid of factual foundation and was inconsistent with all applicable facts. Furthermore, Respondent would also emphasize that extensive briefing has been conducted before the trial court and the New Mexico Supreme Court on three occasions to explore Petitioners' qualified immunity defense with oral argument conducted once in each court, and that in each case Petitioners argued the merits of their qualified immunity claim to those courts. Respondents would further add that New Mexico law requires the State to pay all costs of defending this suit and any settlement or final judgment entered therein against Defendants, § 41-4-4 NMSA 1978. Finally, Respondents add that the official capacity claims against Petitioners Lockwood and Smith over which the trial court retains jurisdiction (Petition at 7) involve virtually identical issues to those raised in Plaintiffs' civil rights claims, except for allowable damages. There will be almost no difference at trial if the qualified immunity defense is allowed, except that Defendants will appear and testify solely in their official rather than both in their individual and official capacities.

SUMMARY OF ARGUMENT

This case satisfies none of the familiar criteria for granting petitions for certiorari. The real issue presented by the Petition is whether state appellate courts must, as

a matter of federal law, conduct a full interlocutory review whenever a trial court denies a defendant's motion to dismiss on the grounds of qualified immunity. Viewed from that perspective, no state or federal appellate court has ever so held. Nor has this court ever ruled that immunity from trial is a federally protected interest that rises to the extraordinary level of importance necessitating the enforced substitution of federal appellate doctrines for state jurisdictional statutes and procedures.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO THE ISSUANCE OF A WRIT OF CERTIORARI

This Court has established guidelines generally defining the conditions under which it will issue a writ of certiorari to the highest state court. Supreme Court Rule 10 reads, in pertinent part:

> A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Among the reasons supporting issuance of the writ are:

> (b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a

> way that conflicts with applicable decisions of this Court.

With regard to granting certiorari from state courts, paragraphs (b) and (c) of Rule 10 are read in conjunction with each other, 13 Moore's Federal Practice 2d § 810.30 (1991). Respondent will demonstrate that none of the above-referenced factors is present in this case.

A. Petitioners have waived their opportunity to seek a writ of certiorari from the New Mexico Supreme Court's order denying them an interlocutory appeal.

Defendants below filed two appeals to the New Mexico Supreme Court from the trial court's order denying their motion to dismiss based on qualified immunity. The first was filed pursuant to New Mexico's final judgment appeal statute, § 39-3-2 NMSA 1978; and the second pursuant to the interlocutory appeal statute, § 39-3-4 NMSA 1978. Both appeals were denied, but one of them has not been timely challenged in this Petition for Writ of Certiorari. The Petition nowhere clearly acknowledges that only one of the two appeals has been timely challenged, and it could even be misread to imply that both orders of the State Supreme Court are subject to this Court's review, see Petition for Writ of Certiorari, page 1 (Opinions and Rulings below), 5, and 22 [request to review the *decisions* below]. Only in their Statement of Jurisdiction at page 1 of their Petition do petitioners identify the later-filed Order as the one from which their certiorari petition is jurisdictional. Respondent will start by addressing the significance of the distinction between the two State Supreme Court orders denying the two appeals.

The first notice of appeal was filed November 8, 1990, "pursuant to *Mitchell v. Forsyth*," 472 U.S. 511 (1985) [this appeal will hereinafter be referred to as the "Mitchell" appeal]. It involved only the denial of the qualified immunity defense. Plaintiffs below filed a Motion to Dismiss this appeal on December 17, 1990. The motion was briefed by both parties and a complete Record Proper filed with the State Supreme Court. Oral argument was held on January 30, 1991, and on that same date the Court granted Plaintiff's Motion to Dismiss the *Mitchell* appeal.

On November 9, 1990, Defendants below filed an Application for Interlocutory Appeal [hereinafter referred to as the "interlocutory appeal"] pursuant to § 39-3-4 NMSA 1978. This was based on the state district court's certification, in its order denying the motion to dismiss, that the order involves certain "controlling questions of law as to which there is a substantial ground for difference of opinion and [that] an immediate appeal from this Order may materially advance the ultimate determination of the litigation." Among these questions of law was the qualified immunity defense. The district court also stayed proceedings below until the interlocutory appeal was determined. Defendants' Application pursuant to the district court's certification comprised a 14-page legal memorandum plus exhibits, including deposition references. Plaintiff responded with his legal brief and deposition references and the State Supreme Court denied the application for interlocutory appeal on November 28, 1990. More than ninety days elapsed from the entry of that Order until the filing of the Petition now before this Court on April 1, 1991. Thus the interlocutory appeal is not properly before this Court for review.

The significance of this distinction between the two orders is that the New Mexico Supreme Court had jurisdiction to entertain the interlocutory appeal, but exercised its discretion not to do so. Since no timely challenge has been filed to that ruling, however, it is only the dismissal of the *Mitchell* appeal that Defendant may seek to overturn here. But, as will be discussed *infra*, the collateral order doctrine relied on in *Mitchell* has never been recognized in New Mexico. The only basis for filing an appeal in New Mexico, other than an interlocutory appeal after certification by the district court, is found in § 39-3-2 *supra*, which provides for appeals, as relevant here, either from final judgments or from interlocutory orders or decrees that practically dispose of the merits of the action. No other relevant appellate jurisdiction has been conferred upon the New Mexico Supreme Court by law, *Thornton v. Gamble*, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984).

The significance of this analysis is that it reveals the extraordinary breadth of the relief for which Petitioners are asking this Court. The Petition does not – and cannot – seek merely to overturn the New Mexico Supreme Court's discretionary act of denying the interlocutory appeal over which it had jurisdiction under state law. To grant Petitioners' request, this Court would have to impose a whole new jurisdictional basis for appellate review in New Mexico, and in any other state similarly situated, for review of immunity determinations in any civil rights cases.

This Response will now demonstrate why such a drastic step would be legally insupportable and unnecessary.

B. The Petition does not present any questions requiring resolution by this Court in a certiorari proceeding.

1. The ruling below does not conflict with any decision by this Court or the federal appellate courts on a federal question (Supreme Court Rule 10(b) and (c)).

As discussed *supra*, Petitioners are of necessity asking this Court to impose a new appellate doctrine upon the judicial system of New Mexico and other states. No prior ruling from this Court or any federal court of appeals has been cited compelling such a result.

Mitchell v. Forsyth, 472 U.S. 511 (1985), establishes that a defendant in a civil rights action brought in the federal courts has a pre-trial right to appeal an order denying his qualified immunity from suit. But to reach that result, the *Mitchell* court interpreted a federal jurisdictional statute, 28 U.S.C. § 1291, and applied the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Similarly, the federal appellate court decisions cited by Petitioners in Part I(C) of their Petition all interpret 28 U.S.C. § 1291.

New Mexico's courts are not governed by 28 U.S.C. § 1291, and have never adopted the collateral order doctrine. The two statutes that confer appellate jurisdiction upon the New Mexico Supreme Court are §§ 39-3-2 and 39-3-4 N.M.S.A 1978. The latter statute, which provides for interlocutory appeals, is not at issue in this Petition because it was not timely filed, as has been previously explained. Section 39-3-2, *supra*, provides for appeals from final judgments, interlocutory orders or decrees that

practically dispose of the merits of the action, and certain post-judgment orders of no relevance here.

The New Mexico Appellate Courts have never adopted a collateral order doctrine such as this Court relied upon in *Mitchell*. Indeed, New Mexico appellate courts adhere strictly and consistently to the statutory limits on their appellate jurisdiction, *Thornton v. Gamble, supra*. Thus, for this Court to grant the relief sought by the Petition would require it not merely to disregard a state *rule of procedure*, or *form of local practice*, as argued in the Petition at page 8, but to upset a *jurisdictional statute* that has been uniformly understood to limit appellate review.

The decisions of this Court cited by Petitioners lend no support to their arguments. In *Felder v. Casey*, 108 S.Ct. 2302 (1988), this court reversed a state supreme court ruling barring assertion of a civil rights claim against a state law enforcement employee because of the claimant's failure to provide notice of the claim within the statutory time period. The Court gave two reasons for its decision: first, the inconsistency of the state court's ruling with the compensatory aims of federal civil rights laws, and second, the state court's violation of the outcome determinative test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Neither basis is applicable to this case.

The first basis for the *Felder* holding was discussed at length in that decision, where the court described how the "central objective" of the civil rights laws was " 'to insure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief'. . . . Thus, [42 U.S.C.] § 1983

provides 'a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and the laws of the Nation' . . . and is to be accorded 'a sweep as broad as its language,' " 108 S.Ct. at 2307. The Court found that the applicability of any state law affecting this remedy must be assessed in light of the "purpose and nature of the federal right" and reaffirmed that the dominant characteristic of civil rights actions is that "they belong in Court," *id.* at 2312.

The Court went on in *Felder* to detail the importance of the civil rights laws and how their essential purposes would be undermined by tolerance of short time limitations on suit such as the state had imposed in that case, *id.* at 2308. The Court there demonstrated its concern that state-imposed time limits should never discriminate in favor of state officials and against litigants seeking vindication of federal civil rights. Yet this Court has never attributed comparable significance to the qualified immunity *defense* to civil rights actions as it has to the right to *bring* them. The reasons given for the qualified immunity defense in *Mitchell*, while valid, are far less lofty or fundamental to the fabric of the federal civil rights laws: to protect state officers from being distracted from their public duties or from being inhibited in the exercise of their discretion, and to prevent the deterrence of people from entering public service. While important considerations, these factors are more of long-term or cumulative concern than is the determination, as in *Felder*, as to whether an individual civil rights claim will be forever barred from judicial remedy by a state time limit on filing a claim.

More importantly, the interest in protecting state officials from unnecessary litigation is a state interest, rather than a federal one. But the state has a competing interest in limiting access to the appellate courts to final judgments. In this case, the New Mexico Supreme Court has elected the latter interest over the former. There is no reason why this Court should choose the more important of two state interests, where no federal interest has been demonstrated. Petitioners' other authorities similarly involved the use of state procedural rules to bar the assertion of federally guaranteed claims, rather than defenses to those claims. See *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) (Federal Employees Liability Act claim cannot be barred by state court's rules of pleading); *Garrett v. Moore-McCormack, Co., Inc.*, 317 U.S. 239 (1942) (Jones Act claim for sailors' compensation may not be defeated by state's stringent burden of proof.)

The second basis for the *Felder* decision – that to bar the claim would violate the outcome-determinative test – is similarly inapplicable to the instant case. In *Felder*, the court relied on the fact that the short notice of tort claim requirement was

> imposed only on a specific class of plaintiffs – those who sue governmental defendants – and . . . is firmly rooted in policies very much related to and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs,

id. at 2310. The time limits were thus found to be distinguishable "rather starkly" from other, uniformly applicable rules, and to discriminate against "the precise type of

claim Congress has created," *id.* By contrast, New Mexico's limited appellate jurisdiction statute has been equally applied to all cases, *Thornton v. Gamble, supra,* and its effect on defendants' attempt to assert their qualified immunity defense is entirely incidental to its universal application.

It must be understood that Petitioners' suggestion that they have been denied a day in court on their qualified immunity defense is highly exaggerated. They received a full hearing, including briefing and argument, and presentation of sworn deposition testimony, before the trial court. They asked for, and received, the trial court's certification of the issue for interlocutory appeal to the State Supreme Court. They presented briefs and written testimony to the State Supreme Court on that interlocutory appeal. They failed to file a timely petition for writ of certiorari to this court from that decision. They filed another appeal to the same court under *Mitchell* and submitted briefs and oral argument on that appeal before it was dismissed. Petitioners have been afforded every conceivable opportunity to be heard on their claims by the state courts. While they are unhappy with the result, Petitioners should not be heard to complain that they have not been listened to by the judicial system of the State.

2. State decisions are not in conflict that *Mitchell* does not control state jurisdictional statutes (Supreme Court Rule 10(b)).

Petitioners argue that the New Mexico Supreme Court order conflicts with those of the highest courts of

other states. In fact, even assuming that the results have been different in individual cases, no state court has held that it was compelled to follow *Mitchell* as Petitioners must argue here.

Petitioners admit that none of the nine state court decisions they have cited "address whether they are bound to follow *Mitchell*," Petition at 12. Actually, several of the state courts cited *do* address the issue, and all who do so find that they are *not* bound by *Mitchell*, regardless of which way they decided on the case before them, *e.g. Noyola v. Flores*, 740 S.W. 2d 493 (Tx.App. 1987) (denial of summary judgment motion not appealable under state law); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 2d 132, 529 N.E. 2d 1290 (1987) ("The State of Ohio is not bound by federal procedural rules," 529 N.E. 2d at 1291); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W. 2d 839 (1987) (court will "look with persuasion upon how the federal courts have interpreted their corresponding rules," 725 S.W. 2d at 842); *Henke v. Superior Court*, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989) (state, not federal, procedural rules apply as long as they do not obliterate the federal right); *Pizzato's, Inc. v. City of Berwyn*, 168 Ill. App. 3d 796, 119 Ill. Dec. 583, 523 N.E. 2d 51 (Ill. App. 1 Dist. 1988), *cert. denied* 109 S.Ct. 1315 (1989) (Illinois law denies appellate courts jurisdiction to review denials of motion to dismiss under federal collateral order doctrine). All of Petitioners' remaining cases are based on *state*-created collateral order or similar doctrines. Not one of Petitioners' nine cases held that *Mitchell* compelled their decision.

When the issue before this court is correctly identified – i.e., whether *Mitchell* compels state courts to review

lower court denials of qualified immunity on an interlocutory basis – it is clear that there is no split among the state courts. In fact, as noted *supra*, Part I(B)(1), Petitioners have had ample consideration of their claim in both the trial and appellate courts of New Mexico.

3. The Petition does not present an important question of federal law which should be settled by this Court (Supreme Court Rule 10(c)).

The true question presented by the Petition – whether a state appellate court is compelled to provide a *Mitchell* review to a trial court's denial of a motion to dismiss based on qualified immunity – does not rise to the level necessitating issuance of the requested writ. As discussed earlier, Defendants below had three opportunities to present their arguments and evidence to the state trial court and Supreme Court; they simply are unsatisfied with the outcome, see *supra*, Part I(B)(1). Also as discussed *supra*, Part I(B)(1), the policy of protecting state employees against litigation burdens through qualified immunity has never achieved the level of importance ascribed to the ability to assert civil rights claims. It is of even less concern to state officials in New Mexico, who are protected by law from having to pay personally litigation costs or to pay any judgment or settlement, § 41-4-4 (B)(D)(G) & (H), NMSA 1978.

Moreover, Petitioners had an alternative to this Petition. They could have filed a timely petition for removal to federal court pursuant to 28 U.S.C. § 1441 availing themselves of the *Mitchell* appeal. Instead, they elected to remain in state court, where the issue of immediate

appeal on qualified immunity claims has yet to be ruled on. Petitioners are before the courts of their own state, by their own acquiescence, and should not be heard by this court to complain of their treatment there.

Finally, the procedural status of this case has reduced this entire issue to the near-trivial. Depositions have already been conducted of the state defendants. Pending claims for breach of contract will require Defendants below to go through trial on almost all the same issues regardless of the outcome of this Petition. This simply is not a case of general importance deserving of review on certiorari, 13 Moore's Federal Practice 2d, § 810.41 (1991).

II. EVEN IF THIS COURT WERE TO GRANT THE PETITION, CERTIORARI SHOULD BE LIMITED TO PETITIONERS' FIRST ISSUE

Even if this Court were to elect to grant the Petition for Writ of Certiorari, the petition should be limited solely to the first issue – properly stated, whether the state appellate courts must take an immediate appeal on an order denying a motion to dismiss based on qualified immunity. Since Petitioners' argument is premised on their insistence that they have had no hearing on their claim, then at most this court should consider whether to compel such a full hearing in the state courts. The New Mexico Supreme Court should, in such an event, decide whether sufficient evidence has been presented on the issue, and should make a substantive ruling on the qualified immunity claim for this Court to review.

This is particularly true since New Mexico law will largely determine whether Defendants are entitled to

assert a qualified immunity defense, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Where state law must be construed to decide the federal issues, the Court regularly allows the state courts to address the issues in the first instance. *See Leathers v. Medlock*, 59 U.S.L.W. 4281 (April 16, 1991).

CONCLUSION

This Petition satisfies none of the criteria for issuance of a Writ of Certiorari, and should be denied.

Respectfully submitted,

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